

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD A. SMITH,

Defendant-Appellant.

UNPUBLISHED
December 17, 2013

No. 311548
Wayne Circuit Court
LC No. 11-012640-FC

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of carjacking, MCL 750.529a. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 17 to 28 years. We affirm defendant's conviction but remand for resentencing.

I. FACTUAL BACKGROUND

The victim was walking to his car, at twilight in Detroit, after leaving the supermarket. As he approached his car, the defendant came from behind and demanded the victim's money and car keys. Defendant threatened to "buss a cap" in the victim. The victim testified that he thought he was about to die and saw that defendant was holding a pistol.

When the victim disclosed that he only had seven dollars, defendant ordered him to walk to the back of the building. The victim turned over his wallet and keys, and defendant drove off in the victim's car. Defendant was convicted of carjacking, MCL 750.529a, and was sentenced to 17 to 28 years in prison. Defendant now appeals.

II. SENTENCING

A. STANDARD OF REVIEW

Defendant first argues that the trial court incorrectly sentenced him as a habitual offender. Because defendant did not raise this issue below, we review this issue for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *People v Wilson*, 252 Mich App 390, 393; 652 NW2d 488 (2002).

Defendant also challenges the trial court's scoring of Offense Variables (OVs) 4 and 10. The trial court's factual determinations during sentencing must be supported by a preponderance of the evidence and will be reviewed for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citation omitted). Whether the facts "are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438 (footnotes omitted).

B. NOTICE OF HABITUAL OFFENDER

Defendant contends that he was not provided with the requisite notice of intent to seek a sentencing enhancement, and the trial court therefore erred in sentencing him as a fourth-offense habitual offender. The prosecution concedes error and agrees that resentencing is required. We agree.

Pursuant to MCL 769.13(1), "the prosecuting attorney may seek to enhance the sentence of the defendant . . . by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense." Further, MCL 769.13(2) states that "[t]he notice *shall* be filed with the court and served upon the defendant or his or her attorney within" the 21-day time limit. (Emphasis added).

In the instant case, the prosecution did not provide notice of its intent to seek a sentence enhancement as required by MCL 769.13. Further, this Court has recognized that MCL 769.13 should be strictly applied, as the plain language of the statute supports no other interpretation. *People v Morales*, 240 Mich App 571, 576-577; 618 NW2d 10 (2000); see also *People v Williams*, 462 Mich 882; 617 NW2d 330 (2000) (vacating the defendant's sentence "because the prosecution's notice of sentence enhancement was not timely filed, that is, within 21 days after the defendant was arraigned."). Moreover, the error in this case altered defendant's sentencing guidelines range and was based on the inaccurate information of the habitual offender status. *People v Francisco*, 474 Mich 82, 88-89, 89 n 5; 711 NW2d 44 (2006). Therefore, we agree with defendant and the prosecution that resentencing is required. *Id.*

C. OFFENSE VARIABLE 4

Defendant next argues that on remand the trial court should correct the scoring error of OV 4. Defendant received 10 points under OV 4, as the trial court found "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34. In *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), this Court recognized that "[t]here is no requirement that the victim actually receive psychological treatment" and because the victim in that case "testified that she was fearful during the encounter with defendant," this

Court found “that the evidence presented was sufficient to support the trial court’s decision to score OV 4 at ten points.”

In the instant case, the victim was alone near a parking lot at twilight in Detroit when defendant approached him from behind with a gun. Defendant demanded that the victim hand over his money and keys and threatened to “buss a cap in” the victim. The victim testified that he thought he was about to die. When the victim informed defendant that he did not have a lot of money, defendant responded with the ominous instruction to walk to the back of the building. Because of defendant’s alarming conduct and the victim’s acute fear, we agree that the evidence supported the trial court’s decision to score 10 points under OV 4. *Apgar*, 264 Mich App at 329.¹

D. OFFENSE VARIABLE 10

Defendant also contends that the trial court erred in scoring OV 10. A score of 10 points is warranted under OV 10 when “[t]he offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). In the instant matter, there is no evidence that defendant exploited the victim’s physical or mental disability, youth or agedness, a domestic relationship, or abused his authority status. See also *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008) (there must be a finding that victim was vulnerable, and the existence of one of the factors listed above does not necessarily equate to a finding of vulnerability). Therefore, we agree that a score of 10 points under MCL 777.40(1)(b) was not supported based on the reasons the trial court provided. However, on remand, the trial court should determine whether defendant’s behavior constituted predatory conduct as defined in OV 10. See MCL 777.40; see also *People v Kosik*, __Mich App__, __NW2d__ (Docket No. 312518, issued November 12, 2013) (slip op at 7-8).

III. CONCLUSION

Because the prosecution did not provide the requisite notice of its intention to seek a sentencing enhancement, the trial court erred in sentencing defendant as a fourth-offense habitual

¹ Even if the trial court’s recollection of the testimony was not entirely accurate, we will affirm a trial court’s decision when it reached the right result even for the wrong reasons. *People v Goold*, 241 Mich App 333, 342 n 3; 615 NW2d 794 (2000). Furthermore, the record does not support defendant’s suggestion that the prosecution conceded at sentencing that OV 4 should be scored at 0 points. The prosecutor merely stated that “to [his] knowledge” he had not received any additional information about whether there was psychological injury. The prosecutor did not challenge the trial court’s reasoning based on the evidence at trial, nor did he concede that OV 4 should be scored at 0 points.

offender. While resentencing is required, we affirm the trial court's scoring of OV 4. Furthermore, while we agree that OV 10 was improperly scored at 10 points, on remand the trial court should consider whether a score for predatory conduct under OV 10 is warranted. We affirm defendant's conviction but remand for resentencing. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Christopher M. Murray

/s/ Michael J. Riordan